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"OTHER ACTS" & CHARACTER EVIDENCE: PART I

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Ohio Evidence Rule 404(B), which governs the admissibility of evidence of "other acts," is one of the most litigated rules in federal and state practice. As one commentator has noted:

> The numbers alone tell the story: In most jurisdictions, alleged errors in the admission of uncharged misconduct are the most frequent ground for appeal in criminal cases; in many states, such errors are the most common ground for reversal; and the Federal Rule in point, Rule 404(b), has generated more reported cases than any other subsection of the rules. E. Imwinkelried, Uncharged Misconduct Evidence viii (1984).

The frequency of litigation is related to the difficulty of applying Rule 404(B) and the significant prejudice that results when the rule is misapplied. "[U]ncharged misconduct is perhaps the most misunderstood area of evidence law." *Id. See also* 2 J. Wigmore, Evidence 246 (Chadbourn rev. 1979) ("bewildering variances of rulings in the different jurisdictions and even in the same jurisdiction").

Prior to the adoption of Ohio Rule 404(B), R.C. 2945.59 governed this issue. "The statute has been a source of major confusion to attorneys and judges alike — even the title itself being subject to some inherent misunderstanding." Herbert & Mount, Ohio's "Similar Acts Statute," 9 Akron L. Rev. 301 (1975). *See also* State v. Flonnory, 31 Ohio St.2d 124, 126, 285 N.E.2d 726, 729 (1972) ("Much confusion about R.C. § 2945.59 might be avoided if it were observed that nowhere therein do the words 'like' or 'similar' appear.").

In addition, the Ohio Supreme Court has written: "Because R.C. 2945.59 and Evid. R. 404(B) codify an exception to the common law with respect to other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." State v. Broom, 40 Ohio St.3d 277, 533 N.E.2d 682 (1975) (syllabus), cert. denied, 490 U.S. 1075 (1989).

"Other acts" evidence, however, cannot be understood without an appreciation of the rules governing character evidence. This is the first of two articles on "other acts" evidence and character evidence. This article focuses primarily on evidence of an accused character — when it is admissible and how it may be proved. The next article examines the remaining issues on character (character of a victim) and then considers "other acts" evidence.

CHARACTER EVIDENCE

Rule 404(A) governs the circumstantial use of character evidence, *i.e.*, the admissibility of evidence of a character trait to prove that a person acted in conformity with that trait on a particular occasion. The rule generally prohibits the circumstantial use of character evidence—i.e., character as proof of conduct.

Three exceptions to this general prohibition are recognized; the exceptions relate to (1) a criminal defendant's character, (2) a victim's character, and (3) a witness' character. With respect to exceptions (1) and (2), it is the accused's or victim's character at the time of the charged offense that is relevant. In contrast, exception (3) involves a witness' character at the time of trial.

Rule 404(A) specifies the conditions under which character evidence may be admitted. The rule, however, does not specify the methods of proof that may be used to establish character. Methods of proof are governed by Rule 405, which generally limits the methods of proof to opinion and reputation evidence. Thus, Rule 404 must be read in conjunction with Rule 405.

Federal Rule 404

Ohio Rule 404 differs from Federal Rule 404 in several important respects. First, the following phrase has been added to Rule 404(A)(1) and (2): "however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable." Consequently, in the specified cases the Ohio rape shield laws, R.C. 2907.02(D) (rape) and 2907.05(D) (gross sexual imposition), and prostitution provisions, 2907.26, override Rule 404. The federal rape shield provision is found in Federal Rule 412; there is no Ohio Rule 412.

Second, Fed R. Evid. 404(B) was amended in 1991 to require pretrial notice: "provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause

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shown, of the general nature of any such evidence it intends to introduce at trial."

The Prohibition of Character Evidence

Rule 404 governs only the *circumstantial* use of character evidence. This use of character is sometimes referred to as "propensity" or "disposition" evidence. For example, a person's character for honesty would be circumstantially relevant to a theft charge because it could be argued that a person with an honest character tends to act in conformity with that character and thus would be less likely to steal than a person of dishonest character. Similarly, it could be argued that a dishonest person tends to act in conformity with that character and thus is more likely to steal than a person with an honest character.

Although character evidence may be probative, at least in some cases, the courts generally have excluded such evidence because "it usually is laden with the dangerous baggage of prejudice, distraction, time consumption and surprise." C. McCormick, Evidence § 188, at 554 (3d ed. 1984).

The Ohio cases have also recognized these dangers. In State v. Lytle, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976), vacated on other grounds, 438 U.S. 910 (1978), the Supreme Court commented: "Although character is not irrelevant, the danger of prejudice outweighs the probative value of such evidence." *Id.* at 402. In State v. Curry, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975), the Court identified the following dangers associated with the admission of character evidence:

> (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes. *Id.* at 68, *quoting* Whitty v. State, 34 Wis.2d 278, 292, 149 N.W.2d 557, 563 (1967), cert. denied, 390 U.S. 959 (1968).

These dangers have crystallized into a general prohibition on the use of character evidence: "A hallmark of the American criminal justice system is the principle that proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime." *Id.* Rule 404 follows this view.

Character in Issue

In most cases, character is not an element of a crime, claim or defense; its potential use is most often circumstantial. It is the circumstantial use of character that Rule 404(A) prohibits — i.e. character as proof of conduct. If, however, character is an element of a crime, or affirmative defense (character in issue), the prohibition of Rule 404(A) does not apply. The federal drafters commented:

> Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. Advisory Committee's Note, Fed. R. Evid. 404.

See also Ohio Staff Note ("Rule 404 does not apply to cases where character is an issue.").

Character in issue presents a fundamentally different use of character evidence than the circumstantial use of character. This distinction can be illustrated by comparing how character relates to the crime of rape and the crime of seduction, which is recognized in some jurisdictions. A male is guilty of seduction "if by means of a promise of marriage he induces a female of previously-chaste character to indulge in sexual intercourse with him." R. Perkins, Criminal Law 385 (2d ed. 1969).

Thus, one of the elements of the crime of seduction is "previously-chaste character." Character in such a case is directly, rather than circumstantially, relevant to an element of the crime. The prosecution is required to establish chaste character. In contrast, chaste character is not an element of rape. *See* R.C. 2907.02. Lack of consent is an element of rape, and the victim's chaste character may be circumstantially relevant to this element; *i.e.*, a woman with an unchaste character is more likely to consent to intercourse than a woman with a chaste character. (Note that Ohio does not recognize seduction as a crime, and the admissibility of a rape victim's character is controlled by R.C. 2907.02(D)).

As the Advisory Committee's Note quoted above indicates, no provision in the Rules of Evidence governs character in issue. There is, however, a provision which governs the methods of proof when character is in issue. Rule 405(B) provides that in "cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct."

The Ohio Staff Note states: "Actions for libel, slander, malicious prosecution, seduction, and assault and battery have been delineated as cases in which character is an issue." In support of this statement, the Staff Note cites Lakes v. Buckeye State Mutual Insurance Assn., 110 Ohio App. 115, 168 N.E.2d 895 (1959). In *Lakes* the court stated: "The generally accepted rule excludes character evidence in civil actions, . . . except in actions for libel, slander, malicious prosecution, seduction or assault and battery, in which, by reason of the nature of the action, the character or reputation of a party becomes a matter in issue." *Id.* at 118. *See also* Melanowski v. Judy, 102 Ohio St. 153, 131 N.E. 360 (1921). Notwithstanding this authority, character is not "in issue" in malicious prosecution or assault and battery cases because character is not *an element* of the crime or of a defense in these cases.

CHARACTER OF THE ACCUSED

Rule 404(A)(1) recognizes an exception to the general prohibition against the admissibility of character evidence. In a criminal case, the accused may offer evidence of a pertinent trait of his character. Once the accused introduces such evidence, the prosecution may offer rebuttal character evidence.

Several additional points are important. First, it is the

defendant's character at the time of the charged offense that is relevant. *See* Wroe v. State, 20 Ohio St. 460, 473 (1870) ("evidence . . . as to the bad character of the defendant subsequent to the commission of the offense ought to have been excluded."). Second, Rule 405(A) limits the methods by which the accused may introduce character evidence. Under that provision only opinion and reputation evidence, and not specific instances of conduct, may be used. Third, in prosecutions for rape and gross sexual imposition, R.C. 2907.02(D) and 2907.05(D) override Rule 404.

Rule 404(A)(1) did not change Ohio law. It has long been the rule in Ohio that in "a criminal prosecution, until a defendant offers evidence of his general good character or reputation, the state may not offer testimony of his bad character or bad reputation." State v. Cochrane, 151 Ohio St. 128, 84 N.E.2d 742 (1949) (syllabus, para. 3); *accord*, State v. Adams, 53 Ohio St.2d 223, 374 N.E.2d 137 (1978), vacated on other grounds, 439 U.S. 811 (1978); State v. Curry, 43 Ohio St.2d 66, 330 N.E.2d 720 (1975); State v. Hector, 19 Ohio St.2d 167, 249 N.E.2d 912 (1969); State v. Markowitz, 138 Ohio St. 106, 33 N.E.2d 1 (1941); Sabo v. State, 119 Ohio St. 231, 163 N.E. 28 (1928); Hamilton v. State, 34 Ohio St. 82 (1877); Griffin v. State, 14 Ohio St. 55 (1862).

Jury Instruction on Character

In some cases, evidence of good character offered by the accused may have a significant impact. As the U.S. Supreme Court has noted: "The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it other evidence would be convincing." Edgington v. United States, 164 U.S. 361, 366 (1896); *accord*, Michelson v. United States, 335 U.S. 469, 476 (1948) ("[S]uch testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt . . .").

See also Ohio Jury Instructions § 411.05 (character and reputation).

Pertinent Character Traits

The exception recognized in Rule 404(A)(1) permits the accused to introduce only evidence of a "pertinent trait of his character." In other words, the character trait must be relevant to the crime charged.

A number of Ohio cases have recognized this rule. In Griffin v. State, 14 Ohio St. 55 (1862), the Supreme Court held that "[t]he general character which is the proper subject of inquiry should also have reference to the nature of the charge against the defendant. Thus, in the present case, the defendant being charged with a crime necessarily importing dishonesty, called witnesses who gave evidence tending to show a general good character for honesty." *Id.* at 63. *See also* Sabo v. State, 119 Ohio St. 231, 239, 163 N.E. 28, 31 (1928) ("In a murder case, such reputation must relate to his being a peaceable, law-abiding citizen.").

In Booker v. State 33 Ohio App. 338, 169 N.E. 588 (1929), the court observed:

> In showing his character, however, [the defendant] is confined to that trait of character that is inconsistent with guilt of the offense charged in the indictment. The accused in this case attempted to qualify a witness to testify to the general reputation of the accused for truth and veracity. . . . Such a reputation might properly be shown in a case of perjury, but it is not a trait involved in unlawful possession of liquor. He then attempted to qualify a witness as to the "general reputation . . . for being a peaceable, quiet, law-abiding citizen." Objection was made. . . . The court sustained this objection, observing that the crime charged was not one of violence, and in this the court was right, for it is of course true that bootlegging may be both peaceable and quiet. *Id.* at 341-42.

Both *Sabo* and *Booker* permit the introduction of the general character trait of being a "law-abiding" person. Such general character may not be encompassed by Rule 404(A), since it is arguably not sufficiently "pertinent" to the crime charged. Nevertheless, the federal cases have rejected such a limitation. *See* United States v. Angelini, 678 F.2d 380 (1st Cir. 1983) (accused's character as law-abiding citizen always admissible); nited States v. Hewitt, 634 F.2d 277 (5th Cir. 1981) (accused's character as law-abiding citizen always admissible). *See also* Annot., 49 A.L.R. Fed. 478 (1980).

METHODS OF PROOF

Rule 405 specifies the permissible methods of proving character. It governs *how* character may be proved but not *when* character may be proved. The latter issue is typically governed by Rule 404(A). If character evidence is admissible pursuant to Rule 404(A)(1) (accused's character) or Rule 404(A)(2) (victim's character), Rule 405(A) provides that reputation or opinion evidence may be used to prove that character. Specific instances of conduct may not be used to prove character but may be the subject of cross-examination.

Reputation Evidence

Rule 405(A) permits the use of reputation evidence to prove character if character evidence is admissible under one of the Rule 404(A) exceptions. Reputation is not synonymous with character; it is only one method of proving character. "There is no doubt that counsel and even courts have sometimes forgetfully treated character and reputation as synonymous. . . . Character of a person is that which he really is, rather than what he is reputed to be . . ." State v. Dickerson, 77 Ohio St. 34, 53, 82 N.E. 969, 971 (1907).

The pre-Rules Ohio cases had recognized the use of reputation to prove character. *See* State v. Elliott, 25 Ohio St.2d 249, 267 N.E.2d 806 (1971), vacated on other grounds, 408 U.S. 939 (1972); State v. Cochrane, 151 Ohio St. 128, 84 N.E.2d 742 (1949); Ohio Jury Instructions § 411.05 (character and reputation).

The offering party, however, must lay a proper foundation, establishing the witness' qualifications to testify about a person's reputation in the community: "The preliminary qualifications of the [character] witness must be such as to advise the court and the jury that he has the means of knowing such general reputation of the [person] in the community. . . ." Radke v. State, 107 Ohio St. 399, 140 N.E. 586 (1923) (syllabus, para. 1). *See also* State v. Rivers, 50 Ohio App.2d 129, 361 N.E.2d 1363 (1977); State v. Johnson, 57 Ohio Abs. 524, 94 N.E.2d 791 (App. 1950), appeal dismissed, 154 Ohio St. 236 (1950).

The community which is the context for the witness' knowledge of reputation may not be too "remote," *i.e.*, a place "where [the accused] has never lived, and where he is not shown to be generally known or acquainted." Griffin v. State, 14 Ohio St. 55 (1862) (syllabus, para. 5). Furthermore, it is knowledge of the accused's reputation at the time of the charged offense that is relevant for this purpose.

Rule 803(20) recognizes a hearsay exception for reputation evidence concerning character.

Opinion Evidence

Rule 405(A) permits the use of opinion, as well as reputation, evidence to prove character if character is admissible under one of the Rule 404(A) exceptions. Thus, a witness who is sufficiently acquainted with the accused may give an opinion of that accused's character.

The Ohio Staff Note indicates that Rule 405 "expands Ohio law by permitting the use of opinion evidence as to character. . . . At common law, proof of character was only by evidence of reputation." The Ohio cases, however, are not clear on this point. Although character could be proved only by reputation evidence for impeachment purposes (*see* Cowan v. Kinney, 33 Ohio St. 422 (1878); Bucklin v. State, 20 Ohio 18 (1851)), the same rule had not been applied consistently when character was admitted on the merits.

For example, in State v. Dickerson, 77 Ohio St. 34, 82 N.E. 969 (1907), the Supreme Court commented:

> [W]e think the accused is not confined to his reputation for a certain trait of character involved in the charge, but may, by those most intimate with him during a course of years, spread before the jury his real self, touching the quality of conduct involved in the issue. Such familiar and intimate acquaintance may enable his neighbors to read him as they would a familiar book. *Id.* at 53-54.

See also Sabo v. State, 119 Ohio St. 231, 239, 240, 163 N.E. 28, 31 (1928); Gandolfo v. State, 11 Ohio St. 114 (1860).

In any event, Rule 405(A) clearly authorizes the use of opinion evidence to prove character. The justification for the rule is set forth in the Advisory Committee's Note to Federal Rule 405.

> In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore § 1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with "the second-hand, irresponsible product of multiplied guesses and gossip which we term 'reputation.'" It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. . . . If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing.

As with reputation evidence, to introduce opinion evidence the offering party must qualify the character witness by laying a foundation showing that the witness is sufficiently acquainted with the accused to have formed an opinion about that person's character.

Specific Instances of Conduct

Evidence of specific instances of conduct could be an effective means of proving character. For example, evidence that a person stole money on a previous occasion would be relevant in ascertaining that person's character for honesty. Although evidence of specific instances of conduct may be the strongest evidence of character, Rule 405(A) does not permit its use when character is admitted under Rule 404(A).

This rule follows prior Ohio law. *See* State v. Cochrane, 151 Ohio St. 128, 134, 84 N.E.2d 742, 745 (1949); Hamilton v. State, 34 Ohio St. 82, 86 (1877); (1949); Hamilton v. State, 34 Ohio St. 82, 86 (1877); Griffin v. State, 14 Ohio St. 55, 63 (1862).

The rationale for this prohibition was commented upon in State v. Elliott, 25 Ohio St.2d 249, 267 N.E.2d 806 (1971), vacated on other grounds, 408 U.S. 939 (1972): "The admission of such evidence would raise collateral issues and divert the minds of the jurors from the matter at hand. It is manifestly unfair to compel a party to defend specific acts alleged as proof of bad reputation or character." *Id.* at 253. *See also* Advisory Committee's Note, Fed. R. Evid. 405 (Such evidence "possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time.").

Rule 405(A) supersedes R.C. 2945.56. That statute permits the prosecution to rebut defense character evidence by introducing evidence of the accused's prior convictions for crimes involving moral turpitude. Because prior convictions are based on specific instances of conduct, the statute is inconsistent with the rule.

PROSECUTION REBUTTAL

The prosecution can respond to character evidence offered by the defense in either of two ways: (1) offering its own rebuttal character witnesses, and (2) cross-examining the character witnesses offered by the defense.

Prosecution Character Witnesses

Once the accused has introduced evidence of a pertinent character trait, the prosecution may offer character evidence in rebuttal.

The same limitations that apply to character evidence offered by the defense apply to the prosecution. First, the character trait that is the subject of rebuttal must be "pertinent" to the crime charged. For example, in a theft case the defense character witnesses should be allowed to testify concerning only the defendant's character for honesty. Similarly, the rebuttal witnesses' testimony should be limited to the same trait, *i.e.*, dishonesty.

Second, Rule 405(A) controls the methods of proof which are available for the presentation of rebuttal character evidence. Thus, the prosecution, like the accused, is limited to opinion or reputation evidence.

Cross-Examination

The prosecution also may challenge defense character evidence through cross-examination. Rule 405(A) provides: "On cross-examination, inquiry is allowable into relevant specific instances of conduct." Thus, a reputation or opinion witness may be asked on cross-examination "if he has heard" or "if he knows" of specific acts. The cross-examiner, however, must take the

witness' answer; that is, extrinsic evidence of the specific acts is not admissible.

In State v. Elliott, 25 Ohio St.2d 249, 267 N.E.2d 806 (1971), vacated on other grounds, 408 U.S. 939 (1972), the Supreme Court commented:

> A character witness may be cross-examined as to the existence of reports of particular acts, vices, or associations of the person concerning whom he has testified which are inconsistent with the reputation attributed to him by the witness — not to establish the truth of the facts, but to test the credibility of the witness, and to ascertain what weight or value is to be given his testimony. Such inconsistent testimony tends to show either that the witness is unfamiliar with the reputation concerning which he has testified, or that his standards of what constitute good repute are unsound. *Id.* (syllabus, para. 2).

See also State v. Howard, 57 Ohio App.2d 1, 385 N.E.2d 308 (1978); State v. Polhamus, 62 Ohio Abs. 113, 106 N.E.2d 646 (App. 1951).

The court in *Elliott* cited Michelson v. United States, 335 U.S. 469 (1948), which is the leading case on this subject. The accused in *Michelson* was charged with bribery of an IRS agent. The U.S. Supreme Court upheld the prosecutor's right to ask defense character witnesses whether they had heard about the accused's twenty-year-old conviction for a trademark violation and twenty-seven-year-old arrest for receiving stolen property. These questions were permitted in order to test the witnesses' familiarity with the accused's reputation in the community. Justice Jackson used the following illustration in *Michelson*:

> A classic example in the books is a character witness in a trial for murder. She testified she grew up with defendant, knew his reputation for peace and quiet, and that it was good. On cross-examination she was asked if she had heard that the defendant had shot anybody and, if so, how many. She answered, "three or four," and gave the names of two but could not recall the names of the others. She still insisted, however, that he was of "good character." The jury seems to have valued her information more highly than her judgment, and on appeal from conviction the cross-examination was held proper. 335 U.S. at 479 n. 16.

The Good Faith Requirement

The risk that the jury will use such information for an mproper purpose — to show character — is great notwithstanding a limiting instruction. Moreover, the practice possesses the potential for abuse. "This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation." 3A J. Wigmore, Evidence 921 (Chadbourn rev. 1970).

Consequently, the courts have required that this type of cross-examination be conducted in good faith; that is, the prosecutor have a good faith basis in fact for asking the question. *See* C. McCormick, Evidence § 191, at 569 (3d ed. 1984); 3A J. Wigmore, Evidence 921 (Chadbourn rev. 1970).

The *Michelson* Court recognized that this type of cross-examination placed a "heavy responsibility on trial courts to protect the practice from any misuse." Michelson v. United States, 335 U.S. at 480. The Court went on to point out that the trial judge in that case

> took pains to ascertain, out of presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to the defendant's reputation. He satisfied himself that counsel was not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box. *Id.* at 481.

Similarly, the Ohio Supreme Court in *Elliot* remarked: "If the defendant had never been convicted of a felonious assault, such question by the prosecutor, being made in bad faith, would be the predicate for error . . . ." 25 Ohio St. 2d at 253.

Pertinent Character Trait

There are additional limitations on the prosecutor's cross-examination. Only acts which bear some relationship to the particular character trait offered by the defendant can properly be raised on cross-examination. For example, if the character witness testifies about the defendant's character for *honesty*, the witness cannot be cross-examined about *violent acts*. *See* Michelson v. United States, 335 U.S. at 483-84; State v. Kraut, 6 Ohio App.3d 5, 7, 451 N.E.2d 515 (1982) (witnesses who testify about truthful character cannot be cross-examined about drug crimes).

Remoteness

In addition, acts which are too remote are not the proper subject of cross-examination. The question concerning the twenty-seven-year-old arrest was permitted in *Michelson* only because "two of [the character] witnesses dated their acquaintance with defendant as commencing thirty years before the trial." *Id.* at 484.